administer Craig's credit cards. Although jurisdiction was vested in the federal district court pursuant to 28 U.S.C. Section 1334, the Bank's complaint against Craig's was automatically referred to the bankruptcy court as Adversary Proceeding No. 96-4541.

By this time, Craig's had brought its own adversary proceeding against the Bank in bankruptcy court asserting state law claims for damages of over $600,000.00(Adversary Proceeding No. 96-4354). Craig's alleged that in 1994 and 1995, the Bank mishandled its customers' credit accounts resulting in excessive charge-backs of the accounts and the eventual closing of its stores. Neither the Bank nor Craig's questioned the jurisdiction of the bankruptcy court to hear and decide their claims against each other in these independent adversary proceedings.

At a hearing in the bankruptcy court on August 7, 1996, on the Bank's Adversary Proceeding No. 96-4541, Craig's stipulated that no distribution of the Norwest Bank settlement would be made pending a hearing on the Bank's request for a preliminary injunction. On September 11, 1996, counsel for both parties informed the bankruptcy court that an agreement had been reached whereby Craig's would pay the sum of $252,440.49 in order to cure the deficiency in the reserve account it maintained with the Bank for its handling of Craig's credit cards. However, because Craig's separate Adversary Proceeding No. 96-4354 sought damages from the Bank for a sum greater than $252,440.49, it was agreed that this sum would not be paid to the Bank as a direct deposit----as required by their contract----but instead would be deposited in the registry of the court pending the outcome of Craig's damage suit against the

Bank.

On October 2, 1996, the bankruptcy court entered an Agreed Upon Order Regarding Request for a Preliminary Injunction in the Bank's Adversary Proceeding No. 96-4541(App. 27-34). The Order stipulated that this $252,440.49 deposited by Craig's in the court's registry is the amount "which [the Bank] represents is the sum of the balances that are 90 days or more past due on the credit card accounts as of August, 30, 1996, and not previously charged back to [Craig's] by [the Bank]..., as provided for in [their contract]..."(App. 27-28). In addition, a formula was put in place to augment this deposited amount "as necessary," depending on the number of Craig's accounts which were 90 days or more past due after August 30, 1996(App. 28-29).

In return for Craig's deposit of this money into the court's registry, the Bank agreed to withdraw its motion to dismiss Craig's Adversary Proceeding No. 96-4354 because of improper venue; agreed to consolidate Craig's Adversary Proceeding with its own Adversary Proceeding; and agreed to withdraw *without prejudice* its motion to cure defaults and to provide adequate assurance of future performance of the confirmed plan or, in the alternative, to convert the case to a Chapter 7 proceeding(App. 31). In addition, Craig's did not have to file an answer to the Bank's complaint in its Adversary Proceeding No. 96-4541(App. 31). However, the Bank was allowed to file an amended answer and counterclaim against Craig's in Craig's Adversary Proceeding No. 96-4354 which had yet to be tried(App. 31).

The parties further stipulated that Craig's was prohibited from paying dividends or making distribution

to its shareholders without the bankruptcy court's permission "and after notice to all parties and opportunity for hearing"(App. 30). The monies deposited into the registry by Craig's was to remain there "until written agreement of all parties or further order of [the bankruptcy court] after notice to all parties and opportunity for hearing..."(App. 28-29). On October 17, 1996, Craig's deposited $252,440.49 into the court's registry under the Bank's Adversary Proceeding No. 96-4541.

Adversary Proceeding No. 96-4354, Craig's damage suit against the Bank for its alleged mismanagement of the credit card accounts, eventually culminated in an 11-day trial in bankruptcy court during March and April of 1997. On September 30, 1997, the bankruptcy judge, Clark, J., issued a memorandum opinion finding for Craig's and awarding it damages in the amount of $449, 315.02.

In its final assessment of damages due Craig's, the bankruptcy judge found that the Bank "is initially entitled to the amount [then] in the Court's Registry, in the amount of $303,872.52" under the Bank's Adversary Proceeding No. 96-4541. Thus she concluded that "[b]ecause the total amount of the setoff and the judgment in favor of [Craig's] exceeds the amount in the Registry, the result is a net recovery for [Craig's] in the amount of $145,442.50, subject to adjustment based upon the parties' accounting." Further accounting led to an order that Craig's was entitled to $27,803.27 more from the funds in the Registry which with interest totaled $29,602.59. When Craig's sought even more money from the registry, the bankruptcy judge denied its motion.

Craig's *never* appealed the bankruptcy judge's determination that the Bank was entitled to a setoff in the damage award for the monies Craig's had deposited into court; it *never* appealed her computation of damages based upon the determination that the Bank was entitled to the money deposited into court; and it *never* appealed the ruling that it was entitled to no more than $29,602.59 in further disbursements upon the parties' further accounting.

The Bank was required to file a supersedeas bond pending its appeal to the district court of the finding in Craig's favor in Adversary Proceeding No. 96-4354. Because the damage award in that proceeding was based on the fact that the money in the court's registry under Adversary Proceeding No. 96-4541 *belonged to the Bank*, it was required to post only the net sum between the total judgment and the money belonging to it in the registry. The bankruptcy court subsequently ordered the Bank to file an amount which was 125% of this net amount or $243,276.78. Craig's did *not* object to this computation of the Bank's supersedeas bond, one which gave the Bank credit for the monies in the court's registry held under Adversary Proceeding No. 96-4541. In fact, Craig's *never* claimed that these monies in the registry did not belong to the Bank.

The Bank's appeal to the district court raised several points, none of which touched on the issue of the bankruptcy court's jurisdiction to decide these post-confirmation, state-law claims by Craig's about the way the Bank serviced Craig's credit card accounts. At a pre-appeal conference, the district court, Hughes, J., *sua sponte* raised the jurisdictional issue and then dismissed the entire dispute for lack of federal jurisdiction to

entertain the controversy. In the alternative, the district judge reversed the finding in Craig's favor because the bankruptcy court had erroneously admitted expert opinion and because Craig's had failed to prove that its losses were caused by the Bank.

Upon Craig's appeal, the court of appeals for the Fifth Circuit affirmed the district court's dismissal on the grounds that the bankruptcy court lacked jurisdiction to decide Craig's post-confirmation state-law claims which comprised Adversary Proceeding No. 96-4354. *In re Craig's Stores of Texas, Inc.*, 266 F. 3d 388(5th Cir. 2001).

The Bank then moved in bankruptcy court for the release of the funds held in the court's registry. In response, Craig's—*for the first time*—asserted that it now was entitled to the funds because it had deposited them into the registry. The bankruptcy judge, noting her lack of jurisdiction to decide Craig's state-law claims which comprised Adversary Proceeding No. 96-4354, incorrectly reasoned that she also lacked jurisdiction to decide the disposition of the funds deposited by Craig's incident to the Bank's Adversary Proceeding No. 96-4541. She denied the Bank's motion *without prejudice* to the Bank seeking such relief "...in a court of competent jurisdiction...."

Upon the Bank's appeal from this ruling, the district court, on September 12, 2003, after first ordering the money be returned to Craig's, then ordered the funds be disbursed to the Bank(App. 23-24). As it found from the record, this money was placed in the court's registry to secure the Bank's account with Craig's while the parties litigated their claims(App. 23). Once it determined that it did not have jurisdiction "over [those] claims," a

decision subsequently affirmed by the court of appeals in *In re Craig's Stores of Texas, Inc.*, 266 F. 3d 388 (5th Cir. 2001), the district judge reasoned that "[n]o other litigation pends"(App. 23). He concluded:

> [t]he sensible result is to disburse the funds to the Bank..., regardless of the source of the funds or who deposited them in the registry. The funds were not paid years ago to the [B]ank on its claim because of the assertion of bankruptcy and other defenses by Craig's, which were dismissed by final judgment on appeal as moot.
>
> The clerk will disburse the deposit with $75,933.59 in interest to [the] Bank...by September 12, 2003.

(App. 23). Craig's appealed this decision.

In a *per curiam* opinion, a majority of the court of appeals for the Fifth Circuit reversed the district judge's disbursement order and directed the district court to disburse the funds to Craig's (App. 1-22).

The majority, clearly confusing the two distinct Adversary Proceedings which the parties had brought in bankruptcy court, thought the Agreed Upon Order entered in the Bank's Adversary Proceeding No. 96-4541 which authorized Craig's deposit of money into the court's registry was *not* evidence of any admission by Craig's that it owed the Bank these funds consistent with its conceded obligation to maintain a reserve account with the Bank under its credit card servicing agreement (App. 2-4). Instead, it characterized the deposit as hinged to Craig's independent Adversary Proceeding No. 96-4354 against the Bank which was a disputed state-law claim having *nothing* to do with Craig's admitted obligation to

maintain the reserve account with the Bank and having *nothing* to do with its deposit of the funds into the court's registry in Adversary Proceeding No. 96-4541(App.3-5).

It further read the Agreed Upon Order as implying that the funds only could be disbursed to the Bank when there was a judgment "on the merits" in the Bank's favor by a court of competent jurisdiction(App. 5). Continuing to confuse the two Adversary Proceedings, it reasoned that since it had earlier ruled that the bankruptcy court lacked the jurisdiction to decide Craig's post-confirmation state-law claims against the Bank (Adversary Proceeding No. 96-4354), the Bank could not follow up its own Adversary Proceeding No. 96-4541 against Craig's by seeking the money Craig's deposited into the registry incident thereto. Rather, the majority indicated that the Bank was bound to begin *another civil action* in state or federal court in order to vindicate its contractual claims against Craig's, claims to which Craig's had *already* acceded when it deposited the funds into the court's registry in Adversary Proceeding No. 96-4541.

Because the "underlying litigation" was dismissed for lack of jurisdiction, the majority of the court of appeals concluded that the registry funds should have been returned to the party who deposited these funds into the registry(App. 4-5). Accordingly, it reversed the lower court's Order Disbursing Funds and remanded with instructions to the district court "that the funds be disbursed to Craig's"(App. 5).

In so ruling, the majority failed to address the fact that Craig's *never* appealed the bankruptcy judge's finding that the Bank was entitled to the money Craig's had already deposited in court in Adversary Proceeding

No. 96-4541; and it *never* appealed the ruling that it was entitled to no more than $29,602.59 in further disbursements from this fund upon the parties' accounting. At this juncture, Craig's had waived any rights to claim the funds as its own.

Nor did the majority address Craig's failure to appeal the bankruptcy court's determination of the amount of the Bank's supersedeas bond, one which gave the Bank credit for the monies Craig's had already deposited into the court's registry in Adversary Proceeding No. 96-4541. Finally, it ignored the fact that Craig's had *never* claimed that these deposited monies in Adversary Proceeding No. 96-4541 did not belong to the Bank until it lost its appeal from the dismissal of its state-law claims against the Bank in Adversary Proceeding No. 96-4354 on jurisdictional grounds and for its failure to prove that the Bank had caused it any injury.

Circuit Judge Dennis dissented from this ruling(App. 6-16). He concluded that even though the bankruptcy court and the district court were retroactively deprived of subject matter jurisdiction by an intervening change-of-law decision by the court of appeals in *In re Craig's Stores of Texas, Inc.*, 266 F. 3d 388 (5th Cir. 2001), the district court continued to have jurisdiction or the inherent judicial power, as well as the statutory duty, to determine the rightful owner of funds within its possession and then to distribute them accordingly(App. 6-7). While he agreed with the majority that the district court's judgment must be reversed, he disagreed with the majority's "peremptory instructions" that the district court *must* distribute the funds to Craig's without making a determination of whether Craig's is the rightful owner(App. 6-7). According to Judge Dennis, the

lower court should be instructed to determine rightful ownership and then distribute the funds pursuant to Fed. R. Civ. P. 67 and 28 U.S.C. Sections 2041 and 2042(App. 5-6;16).

As the dissent reasoned, under the principles enunciated by this Court in *Northwestern Fuel Co. v. Brock*, 139 U.S. 216(1891) and its progeny together with the procedure described in Fed. R. Civ. P. 67 and 28 U.S.C. Sections 2041 and 2042, the district court possesses the inherent power as a court of equity to undo the wrong done by the bankruptcy court acting without jurisdiction by distributing the funds held in its registry to the rightful owner according to the equitable principles of restitution(App. 6-10). Moreover, this restitution by the district court "is not made to depend at all upon the question whether or not the court rendering the judgment reversed acted within or without its jurisdiction"(App. 10 quoting *Northwestern*, 139 U.S. at 220).

As Judge Dennis noted, instead of recognizing this law and remanding the matter to the district court for such an equitable disposition, the majority without any citation of authority "follows a rule of its own creation," i.e., that whenever it is determined that a depositary court lacked subject matter jurisdiction, the registry funds should always be disbursed back to the party that deposited them in the registry(App. 11). As he concluded,

> I believe that both the majority and the district court here are in error in failing to recognize the district court's judicial power and duty to undo any wrong done by the bankruptcy court's process and to distribute the funds in accordance with 28

> U.S.C. Sections 2041-2042, and equitable principles.

(App. 11-12).

The dissent thought this Court's decisions as well as the relevant statutes and rule establish original jurisdiction in the district court—*not* an appellate court—to make this equitable determination(App. 10-13). As it observed, "[a]ppellate courts are not vested with original jurisdiction, authorized by rule or law to make this determination, or permitted to render disbursement orders"(App. 13-14). Instead of usurping the district court's authority, Judge Dennis would have vacated the lower court's judgment and remanded the case "to the depositary court *for it* to determine how the funds on deposit shall be distributed...."(App. 14)(emphasis supplied).

Finally, considering all of the circumstances which led Craig's to deposit the funds into the court's registry in the first place, especially the Bank's detrimental changes of position concerning its claims against Craig's in Adversary Proceeding No. 96-4541, the dissent perceived a denial of due process in the outcome directed by the majority:

> [A] disbursement of the funds to Craig's free and clear of [the Bank's] claims, without compensating [the Bank] for the loss of its claims against the funds and against Craig's personally will unjustly enrich Craig's and be detrimental to [the Bank]. [It] will suffer the unjust penalty and hardship of being deprived of its claims to ownership of the funds without a hearing. The result will be highly

> inequitable and will not return the parties to their former positions.

(App. 16). Judge Dennis therefore would have remanded the matter to the district court with instructions that "it perform its statutory duty under Rule 67 and 28 U.S.C. Sections 2041 and 2042, to determine rightful ownership of the funds...and distribute those funds accordingly"(App. 16).

On May 2, 2005, the court of appeals for the Fifth Circuit denied the Bank's timely filed petition for rehearing *en banc*(App. 25-26).

The Bank has now brought to this Court its petition seeking a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

ARGUMENT SUPPORTING ALLOWANCE OF THE WRIT

1. The Decision Below Is In Conflict With *Northwestern Fuel Co. v. Brock*, 139 U.S. 216(1891), Which Recognizes The Primary Jurisdiction Of The District Court As The Depositary Court To Determine Whether The Bank Was Entitled To Restitution After the Court Of Appeals Found There Was No Subject Matter Jurisdiction To Hear This Controversy.

In *Northwestern*, the plaintiff, a Minnesota corporation as the assignee of contract rights of an Iowa company, brought suit in a circuit court in Iowa invoking its original jurisdiction and seeking damages from the defendants, also citizens of Iowa, for breach of contract. Judgment was recovered in the amount of $1402.47 but it

was later reversed by this Court for lack of subject matter jurisdiction in light of 18 Stat. 470, the Act of 1875, which provided that neither the circuit court nor the district court shall "have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court...if no assignment had been made...." *Brock v. Northwestern Fuel Co.*, 130 U.S. 341, 342(1889). Since under the Act, the parties were all citizens of Iowa, there was no diversity of citizenship and it did not affirmatively appear that the federal court possessed jurisdiction to hear the controversy. *Id.*

Awarding the defendants their costs, the Court remanded the matter to the lower court "for further proceedings in accordance with law." *Id.* at 342-343. Once the mandate issued, the defendants, alleging that $629.23 had already been collected by the plaintiff on the judgment, moved in the lower court for the return of these sums with interest "unless the plaintiff should...show a cause of action of which the court had jurisdiction." The plaintiff failed to make this showing and the lower federal court issued a judgment "in restitution" awarding the defendants this sum with interest and dismissing the cause for lack of subject matter jurisdiction.

In affirming the judgment, this Court rejected the notion that after it had determined that the lower court lacked subject matter jurisdiction, that tribunal had no further power "to render judgment for restitution of the money collected on the reversed judgment." *Northwestern Fuel Co. v. Brock*, 139 U.S. 216, 218-219(1891). Speaking through Justice Field, the Court stated:

[H]ere the jurisdiction exercised by the

> court below was only to correct by its own order, that which, according to the judgment of its appellate court, it had no authority to do in the first instance; and the power is inherent in every court, whilst the subject of controversy is in its custody, and the parties are before it, to undo what it had no authority to do originally, and in which it, therefore, acted erroneously, and to restore, as far as possible, the parties to their former positions. *Jurisdiction to correct what had been wrongfully done must remain with the court so long as the parties and the case are properly before it, either in the first instance or when remanded to it by an appellate tribunal.*

Id. at 219(emphasis supplied).

The matter was to proceed "under the control of [lower court]," acting as a court of equity and applying principles of restitution in this calculus "so that...no further wrong be committed." *Id.* at 220. Moreover, the *Northwestern* Court made clear that "[r]estitution is *not made to depend at all* upon the question whether or not the court rendering the judgment reversed acted within or without its jurisdiction."*Id.*(emphasis supplied).

In reaching this result, the Court relied upon *Bank of the United States v. Bank of Washington*, 31 U.S. (6 Pet.) 8, 17;19(1832). There debtors who had collected on a judgment used the funds for their own purposes even though the case had been appealed. When the decision in favor of the debtors was later reversed by this Court, they were subject to a writ of restitution by the other party *in the lower court* "because the law raises an

obligation in the party to the record, who has received the benefit of the erroneous judgment, to make restitution to the other party for what he has lost." *Id.* at 17. The Court concluded:

> [t]he reversal of the judgment gives a *new* right or cause of action against the parties to the judgment, and creates a legal obligation on their part to restore what the other party has lost, by reason of the erroneous judgment; and as between the parties to the judgment, there is all the privity necessary to sustain and enforce the right....

Id. at 19(emphasis supplied).

Since *Northwestern*, this Court has reaffirmed the principle that where a judgment is eventually rendered void on appeal for lack of subject matter jurisdiction or for some other defect in the proceedings below and where property or funds have passed between the parties in the course of this defective judgment, the law recognizes a right in the party who has sustained a loss thereby to restitution from the other party; and it is the duty of *the district court and only the district court to decide this issue*, sitting as a court of equity and addressing "these converging equities with all their cumulative power." *Atlantic Coast Line v. Florida*, 295 U.S. 301, 313-314 (1935)(Cardozo, J.).

In *B. & O. R. Co. v. United States*, 279 U.S. 781, 786-787(1929), the Court explicitly identified *the district court* as the appropriate forum to determine the restitution due certain railroad carriers in St. Louis after this Court reversed the rates charged them by the Interstate Commerce Commission. *Id.* at 783. As the

Court saw it, until it invalidated the fees charged them, payment by these railroad carriers benefitted their competitors "just as if made directly to them." *Id.* at 786. It was the *duty* of the lower court *even without a remand by an appellate court* "to retain jurisdiction of the case, enter a decree that the appellants are entitled to restitution and refer the case to a master..."*Id.* at 786-787(emphasis supplied). *Accord, Arkadelphia Co. v. St. Louis S. W. Ry. Co.*, 249 U.S. 134, 145-146(1919)(Restitution "is one of the equitable powers, inherent in every court of justice so long as it retains control of the subject matter and of the parties, to correct that which has been wrongfully done by virtue of its process.").

Similarly, in *Atlantic Coast Line v. Florida*, 295 U.S. at 314, a case addressing the fairness of freight fees charged by a railroad carrier under an Interstate Commerce Commission order, the Court stated that the "*district court* whose decree we are reviewing was organized to pass upon the question whether the challenged order of the Commission should be vacated or upheld....[and] [w]hatever power it has to compel restitution by the carrier of items subsequently collected *derives from that primary jurisdiction* and is ancillary thereto." *Id.*(emphasis supplied). In order to prevail, the claimant "must show that the money was received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it." *Id.* at 309.

Finally, in *Morgan v. United States*, 304 U.S.1, 23;26(1938), the Court invalidated an order of the Secretary of Agriculture fixing stockyard rates in Kansas City because it was not accompanied by fair hearings. In

refusing to reconsider its ruling, the Court also refused to instruct the district court on remand concerning the disposition of the monies impounded by the lower court representing charges paid in excess of the rates fixed by the Secretary. *Id.* As the Court observed,

> [t]hese questions are appropriately for the District Court and they are not properly before us upon the present record. We have ruled that the order of the Secretary is invalid because the required hearing was not given. We remand the case to the District Court for further proceedings in conformity with our opinion. What further proceedings the Secretary may see fit to take in light of our decision, or *what determinations may be made by the District Court* in relation to any such proceedings, *are not matters which we should attempt to forecast or hypothetically to decide.*

Id. at 26(emphasis supplied).

Soon thereafter, in *United States v. Morgan*, 307 U.S. 183, 193-194;197-198(1939), the Court revisited the district court's duties as a depositary court when the district judge decided to release the impounded funds before the Secretary had issued new rates. *Id.* at 187. In reversing his decision, the *Morgan* Court reiterated the principle that the district court sits as a court of equity and

> assumes the duty of making disposition of the fund in conformity to equitable principles;...*he assumed the duty of making the proper disposition of the fund upon the termination of the litigation*....His

> determination, if supported by evidence and made in a proceeding conducted in conformity with the statute and due process, will afford the appropriate basis for action in the district court in making distribution of the fund in its custody.

Id. at 191;193;198(emphasis supplied).

Northwestern and its progeny, then, stand for the proposition that even if the district court does not have subject matter jurisdiction of the controversy and even without a remand from the appellate court which decided the jurisdictional question, where the parties are properly before it and where the ~~fund deposit~~ed into the court's registry by one or both of the parties is still within its custody, the district court has the primary jurisdiction or inherent power, indeed the duty, to determine the fund's rightful owner under equitable principles of restitution. The core inquiry in such a proceeding, one which must conform with due process, is whether a party's claim to the fund in the circumstances will give offense to equity and good conscience. The court of appeals here exceeded its jurisdictional ambit by deciding title to the funds by way of "...peremptory instructions ...."

Restitution "is *not made to depend at all* upon the question whether or not the court rendering the judgment reversed acted within or without its jurisdiction."*Northwestern*, 139 U.S. at 220 (emphasis supplied). Nor does the power in the district court to dispose equitably of the money it holds in its registry hinge on the terms of a remand from its own appellate court. *B. & O. R. Co. v. United States*, 279 U.S. at 786-787. See *Northwestern*, 139 U.S. at 319. The power is inherent in the district court itself and its right—indeed its duty—

to undo wrongs caused the parties before it by a failure of its own process. *Northwestern, supra.* See *Restatement of Restitution* Section 74, *comments a., b. and c.*, Illustration 7.

The majority's order on remand contravenes all of this law. After failing to distinguish the Bank's core Adversary Proceeding No. 96-4541 which required Craig's to deposit $252,440.49 into the court's registry from Craig's non-core, independent Adversary Proceeding No. 96-4354 for which there was no jurisdiction in the bankruptcy court, the majority bundled them together, declared a lack of subject matter jurisdiction to decide either of these proceedings and directed the district court to disburse the funds back to Craig's, the party who had deposited the money into the registry, even though Craig's deposit had nothing to do with Craig's non-core Adversary Proceeding which was justifiably dismissed(App. 4-5).

Under the majority's remand order, the district court is left with no latitude under its primary jurisdiction to determine the rightful owner of the funds it holds; it is deprived of its fundamental power to act as a court of equity and to fashion an appropriate order of restitution in the unique circumstances of this case; and it is left with no duty except ministerially to carry out the (mistaken) wishes of the appellate court in order to dispose of this case. However, at least in federal court, the district judge is more than a mere moderator of events occurring before him. He must not only avoid error before it takes place, he must also undo error that has already taken place as a result of the court's own process. *Carlisle v. United States*, 517 U.S. 416, 437-438 & n.1(1996) (Stevens, J., dissenting) citing *Brown v. Walter*, 62 F. 2d 798, 799(2nd

Cir.1933)(Hand, L., J.).

The majority usurps the primary jurisdiction of the district court to make this equitable determination and nullifies this Court's decision in *Northwestern Fuel Co. v. Brock*, 139 U.S. 216(1891) as well as those decisions of the Court which have followed it. A writ of certiorari is therefore warranted to review the majority decision of the court of appeals for the Fifth Circuit.

2. The Court of Appeals Acted Beyond Its Jurisdiction And Usurped The Primary Jurisdiction of The District Court When It Directed The Lower Court To Disburse To Craig's The Money Held In Its Depositary.

"It is well settled that...jurisdiction of a Circuit Court of the United States is limited in the sense that it has no other jurisdiction than that conferred by the Constitution and the laws of the United States." *Hanford v. Davies*, 163 U.S. 273, 279(1896). Like a district court, the court of appeals is an Article III inferior court, created by Congress in 1891, and possesses only such power as is conferred by statute. *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 371-372(1978). *Insurance Corp. v. Compagnie Des Bauxites*, 456 U.S. 694, 701-702(1982).

A corollary principle is that the affirmation by an Act of Congress of appellate jurisdiction in the court of appeals implies the negation of all such jurisdiction not so affirmed. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 513(1868). It is "almost a necessary consequence that acts of Congress, providing for the exercise of jurisdiction,

should come to be spoken of as acts granting jurisdiction, and not as acts making exceptions to the constitutional grant of it." *Id. The Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 252(1867). In fact, there is a presumption that a federal court lacks jurisdiction to decide a matter until it has been affirmatively demonstrated that jurisdiction over the subject matter exists through some statutory grant of power. *Hornthall v. The Collector*, 76 U.S. (9 Wall.) 560(1869). *Turner v. Bank of North America*, 4 U.S. (4 Dall.) 8, 9-10(1799).

Without jurisdiction, the court cannot proceed in any cause; jurisdiction is power to declare the law and when it ceases to exist, "the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 74 U.S. (7 Wall.) at 514. *The Mayor v. Cooper*, 73 U.S. (6 Wall.) at 250. Every federal court, including the court of appeals, therefore has the duty *sua sponte* to reaffirm the statutory grant which gives it the jurisdiction or power to dispose of the controversy before it so that it "shall [not] use the judicial power of the United States in a case to which the Constitution and laws of the United States have not extended that power." *M.C. & L.M. Railway Co. v. Swan*, 111 U.S. 379, 384(1884). *The Dred Scott Case*, 60 U.S. (19 How.) 393, 567 (1856)(Curtis, J., dissenting).

If the majority had performed this necessary function, it would have concluded that there is *no* affirmative statutory grant of power by any Act of Congress which allows it to order disbursement to a party of funds held in *another* federal court's depositary. 28 U.S.C. Section 2041 provides that when monies are paid into "any court of the United States," that "court"---*the court which holds the money*----may deliver those

funds "to the rightful owners upon security, according to agreement of parties...." Section 2042 of Title 28 further provides in its first paragraph that no money so deposited in court under Section 2041 may be withdrawn "except by order of court," i.e., the court authorized under Section 2041 to accept the deposit and *the court which holds the money*. See also Fed. R. Civ. P. 67 (Deposit in Court).

Accordingly, the jurisdiction of a federal appellate court or a district court to disburse funds held in a federal court depositary is made entirely to depend upon whether that court is the depositary court holding the money which is sought to be disbursed. See *Northwestern*, 139 U.S. at 219. If it is not, it lacks jurisdiction to dispose of such funds in any manner, much less peremptorily and without a hearing as the majority has done. On the other hand, if it is the depositary court, it can proceed to disburse the funds as a matter of restitution consistent with the standards of *Northwestern* and its progeny. This district court, as the depositary court, is the *only* federal court possessing the jurisdiction to make this determination under *Northwestern* and the relevant statutes. The majority of the court of appeals has exceeded its jurisdiction in ordering that the funds held in the district court's depositary now be disbursed to Craig's.

When the court of appeals acts in disregard of the statutory limits on its own jurisdiction, usurping the jurisdiction of the district court in the process, this Court's power of superintendency over the federal judiciary is rightly invoked. After the majority of the court of appeals determined that the bankruptcy court lacked subject matter jurisdiction over the case, its "only function remaining...[was] that of announcing the fact and

dismissing the cause," *Ex parte McCardle*, 74 U.S. (7 Wall.) at 514, leaving to the district court the task of exercising its primary jurisdiction as the depositary court to disburse the funds it holds consistent with principles of restitution.

3. The Court Of Appeals' Order Denied the Bank A Fair Hearing On Its Claims That The Money Deposited By Craig's In The District Court's Registry As A Matter Of Restitution Should Be Disbursed To the Bank.

Because restitution is a creature of equity, whether the district court should disburse to the Bank the funds in its registry will turn on whether the Bank can show that it will offend "equity and good conscience" if Craig's is permitted to retain the funds. *Atlantic Coast Line v. Florida*, 295 U.S. at 309. It is a matter of "converging equities with all their cumulative power" and depends on the particulars of each individual case. *Id.* at 313-314.

The Bank, if given the opportunity in the district court, will assert that Craig's deposit of the money into the court's registry was *not* disputed; that it was placed there by Craig's in order to cure its admitted deficiency in the reserve account it maintained with the Bank for its handling of Craig's credit cards; and that it remained in the court's registry not because of any "dispute" about whether Craig's owed the Bank this sum—even Craig's admitted that it did---but rather because Craig's had its own far greater claim against the Bank and if Craig's prevailed, the Bank agreed that the monies deposited into court would apply against this judgment. The monies deposited into court by Craig's *always* were regarded by

the parties as belonging to the Bank and were subject for use by the Bank to offset any sums eventually found due from the Bank on Craig's claims against it.

The Bank would also assert that Craig's *never* appealed the bankruptcy judge's finding in Adversary Proceeding No. 96-4354 that the Bank was entitled to the money Craig's had already deposited in court in Adversary Proceeding No. 96-4541; and it *never* appealed the ruling that it was entitled to no more than $29,602.59 in further disbursements from this fund upon the parties' accounting. Nor did Craig's appeal the bankruptcy court's determination of the amount of the Bank's supersedeas bond, one which gave the Bank credit for the monies Craig's had already deposited into the court's registry in Adversary Proceeding No. 96-4541. In fact, Craig's *never* claimed that these deposited monies in Adversary Proceeding No. 96-4541 did not belong to the Bank until it lost its state-law claims against the Bank in Adversary Proceeding No. 96-4354 on jurisdictional grounds and for its failure to prove that the Bank had caused it any injury.

Finally, as found by Judge Dennis in his dissent, the Bank would argue that not compensating it for the loss of its claims against the funds and against Craig's personally, claims which it gave up in return for Craig's depositing these monies in the court's registry, will unjustly enrich Craig's and impoverish the Bank to its detriment.

However, none of these considerations attendant to an equitable disbursement of the monies as a matter of restitution can be realized without a hearing addressing these matters. The Bank's equitable right to the deposited funds is a valuable property right and is

entitled to due process protection. *Board of Regents v. Roth*, 408 U.S. 564, 571-572(19972). The Bank cannot be denied the opportunity to adduce argument in support of its equitable right to these funds without notice and a hearing. *Id. Matthews v. Eldridge*, 424 U.S. 319, 333(1976). *Armstrong v. Manzo*, 380 U.S. 545, 552(1965). See *United States v. Morgan*, 307 U.S. at 193;198. To rule, as the majority has, that Craig's deserves to have the monies returned to it, without any hearing in the district court, is to deny the Bank due process and a fair hearing on its claims that the funds deposited by Craig's in the district court's registry as a matter of restitution should be disbursed to the Bank.

CONCLUSION

For all of the reasons identified herein, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Fifth Circuit and, ultimately, to reinstate the judgment of the district court entered below disbursing the funds to the Bank; or to declare that the district court possesses the primary jurisdiction to determine the ownership of the funds it holds in its registry as a matter of restitution; to remand the matter to the district court for further proceedings; or to provide the Bank with such other relief as is fair and just in the circumstances.

Respectfully submitted,

Henry L. Klein
Counsel of Record
844 Baronne Street
New Orleans, LA 70113-1103
(504)586-9971
Attorney for Petitioner

(Any footnotes trail end of each document)

No. 03-20888

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

In The Matter of:
CRAIG'S STORES OF TEXAS INC.,
Debtor.

CRAIG'S STORES OF TEXAS INC.,
Appellant,

versus

BANK OF LOUISIANA,
Appellee.

March 4, 2005, Filed

COUNSEL: For CRAIG'S STORES OF TEXAS INC, Appellant: John H Glover, Steven J Knight, Chamberlain, Hrdlicka, White, Williams & Martin, Houston, TX.

For BANK OF LOUISIANA, Appellee: Henry L Klein, Klein Daigle, New Orleans, LA.

JUDGES: Before REAVLEY, JONES and DENNIS, Circuit Judges. DENNIS, Circuit Judge, concurring in the decree insofar as it reverses the district court's judgment and remands the case to that court, but otherwise dissenting.

OPINION: PER CURIAM:

This case involves a court's obligations regarding money deposited into the court's registry for a proceeding over which that court had no jurisdiction. During the course of litigation in bankruptcy court between Craig's Stores of Texas, Inc. ("Craig's") and Bank of Louisiana ("the Bank"), Craig's deposited the sum of $ 252,440.49 into the court's registry. This court decided in Bank of La. v. Craig's Stores of Texas, Inc. (In re Craig's Stores of Tex., Inc.), 266 F.3d 388 (5th Cir. 2001), however, that the bankruptcy court lacked jurisdiction over the adversary proceeding between Craig's and the Bank. The district court released the deposited funds to the Bank because it determined that the funds had been placed in the registry to secure the Bank's account claim. We hold that the district court's disbursement order results in the transfer of funds to which the Bank has never proven entitlement before a court of competent jurisdiction. We must reverse the district court's Order Disbursing Funds and remand this case with instructions to disburse the funds to the party that deposited them.

Pursuant to Rule 67 of the Federal Rules of Civil Procedure, a party may deposit a sum of money with the court. Once funds are deposited, the court should determine ownership and make disbursements. Gulf States Utils. Co. v. Alabama Power Co., 824 F.2d 1465, 1474 (5th Cir. 1987). The conclusion that the funds must be returned to Craig's flows from the Agreed Order by which Craig's deposited the money in the registry and from the circumstances surrounding this transaction.

In mid-1996, eighteen months after the approval of

Craig's Chapter 11 reorganization plan, Craig's filed an adversary proceeding against the Bank in bankruptcy court alleging that the Bank failed to perform under a charge account contract. At this time, the Bank filed its own adversary proceeding, seeking an injunction to prevent Craig's from disposing of funds within its possession, requesting the bankruptcy court to convert Craig's confirmed Chapter 11 plan to a Chapter 7 liquidation, and seeking to recover money that the Bank contended was owed under the contract between them. Shortly thereafter, the bankruptcy court entered an Agreed Order whereby Craig's would deposit the sum of $ 252,440.49 into the Bankruptcy Court's registry.

Craig's asserts that it made this deposit for the purpose of discouraging the Bank from attempting to convert Craig's bankruptcy proceedings into Chapter 7 liquidation. Craig's deposited the money in escrow in order to reassure the Bank that Craig's would not transfer or dispose of its liquid funds before the Bank could litigate and liquidate any underlying claim the Bank might have against Craig's.

The Bank urges a different understanding of this deposit. According to the Bank, Craig's deposit represented a concession that it owed the Bank $ 252,440.49 under the contract. In other words, Craig's was relinquishing its claim to the funds, and the Agreed Order functioned as a kind of "settlement agreement" whereby Craig's recognized its liability to the Bank under the contract. Instead of paying the money directly to the Bank, the Bank made the accommodation that the funds would be deposited in the registry pending Craig's litigation of its state-law

claims against the Bank. The money would be released back to Craig's only in the event that Craig's won a judgment against the Bank.

The Agreed Order supports the understanding advanced by Craig's. There are no representations or concessions in this escrow order that the money actually belonged to the Bank. The Bank's argument that the Agreed Order constituted an enforceable "settlement agreement" fails because the Agreed Order treats these funds as disputed. For example, on the first page of the Agreed Order, the Bankruptcy Court noted: "Ordered that on or before Oct. 11, 1996, the Debtor shall deposit . . . into the registry of this Court (the "Court's Registry") $ 252,440.49, which BOL represents is the sum of the balances that are 90 days or more past due on the credit card accounts as of August 30, 1996." (Emphasis added).

The Agreement is neutral on the ultimate recipient of the deposited funds, as evidenced by a paragraph providing for disbursement of accumulated interest "upon further order of the court." Likewise, the order authorizes holding the deposited balance in the registry "pending further order of this Court." In neither paragraph is there a reference to a settlement agreement or to any certainty as to which party will be entitled to the funds.

Finally, the Agreed Order expressly contemplated and permitted the Bank to assert claims against Craig's -- claims that would be unnecessary if the Agreed Order constituted a settlement. On the fifth page of the Agreed Order, the bankruptcy court stated: "ORDERED that leave is hereby granted to BOL to

file (I) an amended answer and (ii) a counterclaim against the Debtor in the Adversary Proceeding No. 96-4354." n1

According to the terms of the Agreed Order, ownership of the money in the court's registry was at all times disputed and the funds were not deposited pursuant to a "settlement agreement." n2 The funds could be disbursed to the Bank only if there had been a judgment on the merits in its favor by a court of competent jurisdiction. After the underlying litigation was dismissed, however, the Bank never filed an independent lawsuit in state or federal court to adjudicate any contractual breach. Craig's may well be liable to the Bank for contract damages; unfortunately for the Bank, no such decision has been made in the course of litigation before a court possessing jurisdiction.

For these reasons, when the underlying litigation was dismissed for lack of jurisdiction, the disputed registry funds should have been disbursed back to the party that deposited them in the registry -- Craig's. n3

Accordingly, we REVERSE the district court's Order Disbursing Funds and REMAND with instructions to the district court that the funds be disbursed to Craig's.

REVERSED AND REMANDED WITH INSTRUCTIONS.

CONCURBY: DENNIS(In Part)

DISSENTBY: DENNIS(In Part)

DISSENT: DENNIS, Circuit Judge, concurring in the decree insofar as it reverses the district court's judgment and remands the case to that court, but otherwise dissenting.

The bankruptcy and district courts were retroactively deprived of bankruptcy jurisdiction by an intervening change-of-law decision by this court. See Bank of La. v. Craig's Stores of Texas, Inc. (In re Craig's Stores of Tex., Inc.), 266 F.3d 388, 391 (5th Cir. 2001) ("adopting a more exacting theory of post-confirmation bankruptcy jurisdiction."). Nevertheless, in my opinion, the district court continues to have the jurisdiction or inherent judicial power, and the statutory duty, to determine the rightful ownership of funds within its possession and to distribute them accordingly. Consequently, the district court's decision that it did not have authority to make that determination and distribution was based on a legal error. Therefore, I agree that the district court's judgment must be reversed and that the case should be remanded, but I disagree with the majority's peremptory instruction that the district court must distribute the funds to one of the parties without making a determination of whether that party is the rightful owner. The district court should, instead, be instructed to determine rightful ownership and to distribute the funds accordingly pursuant to Federal Rule of Civil Procedure 67 and 28 U.S.C. §§ 2041 and 2042.

The district court has the jurisdiction or inherent judicial power to undo the wrongs done by the bankruptcy court's process and distribute the funds in the court's registry to the rightful owners according to law and equity pertinent to this limited purpose. n4

Anglo-American courts in general, including the Supreme Court and this court, have long held that, after a reversal of a district court's judgment, for either lack of jurisdiction or legal error, the district court has the inherent judicial power, with respect to the parties before it, to distribute funds in its custody, or to order restitution of property wrongly obtained because of its erroneous or void judgment, according to equitable principles. n5

The right of restitution of what one has lost by the enforcement of a judgment subsequently reversed was recognized from a very early period in the law of England and early in our history by the United Supreme Court. n6 In Northwestern Fuel Co. v. Brock, n7 the Supreme Court again recognized that right and further held that, when the judgment of a court of origin is reversed for lack of jurisdiction, that court has the inherent power, to "correct by its own order that, which, according to the judgment of its appellate court, it had no authority to do in the first instance," while the parties are before it and the subject matter of the controversy is in its custody. n8 "Jurisdiction to correct what had been wrongfully done must remain with the court so long as the parties and the case are properly before it, either in the first instance or when remanded to it by an appellate tribunal." n9 Moreover, the original court has this inherent corrective power even though the mandate of reversal fails to provide for restitution. n10 The Supreme Court explained:

The gist of the whole complaint is that the reversal by this court being for want of jurisdiction in the Circuit Court. . .that court had no authority to act further in the matter than as directed by the mandate; and that

that went only to the reversal of its judgment and the collection of the costs incurred in the appellate court. . . .But here the jurisdiction exercised by the court below was only to correct by its own order, that which, according to the judgment of its appellate court, it had no authority to do in the first instance; and the power is inherent in every court, whilst the subject of controversy is in its custody, and the parties are before it, to undo what it had no authority to do originally, and in which it, therefore, acted erroneously, and to restore, as far as possible, the parties to their former position.n11

The inherent power of courts to enforce the right of restitution after appellate reversals discussed by the Supreme Court in Northwestern Fuel Co. is now accepted generally. For example, the Restatement (First) of Restitution demonstrates that virtually all reported court decisions have adhered to the principles that Northwestern Fuel Co. articulates. Section 74, which states the right of restitution when a judgment is subsequently reversed, provides: "A person who has conferred a benefit upon another in compliance with a judgment, or whose property has been taken thereunder, is entitled to restitution if the judgment is reversed or set aside, unless restitution would be inequitable or the parties contract that payment is to be final; if the judgment is modified, there is a right of restitution of the excess." n12 Comment b. under § 74 reflects the general view that a court has inherent power to enforce the right of restitution in this situation even when the judgment is void because the court lacked jurisdiction. It, in pertinent part, states: "The rule is applicable whether the judgment reversed was originally valid or was void." n13 The reporters'

notes to § 74 demonstrate the courts' general reliance on the principles of Northwestern Fuel Co.. Citing Northwestern Fuel Co. and other cases consistently following that decision, they state: "The tribunal reversed can direct restitution on its own initiative." n14 And further that: "An action lies although the judgment reversed was 'void,' the court having power to remedy its own mistake[.]" n15

In United States v. Morgan n16 the Supreme Court reaffirmed the principles discussed in Northwestern Fuel Co. and held that a district court, to the extent not governed by law or guided by regulatory order, should apply equitable principles in distributing funds in that court's custody resulting from its injunction of the secretary of agriculture's order reducing scheduled rates for stockyard services. n17 In its opinion, the Court summarized those principles n18 and concluded that, when a court has compelled payments into its registry of amounts which may be found not to have been due, justice requires ultimate distribution of the funds to those persons entitled to them. n19 "The district court sits as a court of equity," the Court also said, "and...assumes the duty of making dispositions of the fund in conformity to equitable principles." n20 It is also self-evident that a court's inherent power to require restitution of property in a party's possession, rather than in the registry of the court, after a reversal of its erroneous or void judgment, necessarily includes the power after such a reversal to make equitable distribution, to persons entitled to them, of funds on deposit pending the litigation of the parties controversy.

Further, the Supreme Court, in Northwestern Fuel Co.

and Morgan, established the procedures and standards to be applied by a district court in making restitution or distribution of funds under equitable principles. In Northwestern Fuel Co. the Court explained:

We are of opinion that the proceeding to enforce the restitution in the cases mentioned is under the control of the court, and that all needed inquiry can be had to guide its judgment in a summary proceeding, upon motion of the parties; the only requisite being that the opposite party shall be heard, so that in directing restitution no further wrong be committed. The restitution is not made to depend at all upon the question whether or not the court rendering the judgment reversed acted within or without its jurisdiction. n21

In Morgan, the Court stated that the district court, "in taking the payments into custody...acted as a court of equity, charged both with...the responsibility of protecting [and] disposing of it according to law, and free in the discharge of that duty to use broad discretion in the exercise of its powers...to avoid an unjust or unlawful result." n22 The Morgan Court recognized that a district court is not bound by any contract or understanding with the litigants; its duty is in distributing the funds in its custody as "prescribed by the applicable principles of law and equity[.]" n23

The Fifth Circuit, in W. F. Potts & Co. v. Cochrane, n24 applying the Northwestern Fuel Co. principle, n25 approved of a district court's undoing of its erroneous assertion of jurisdiction in taking custody of property and appointing a receiver, n26 but disapproved of that court's decision in making restitution because it was

"not in accordance with the equitable principles applicable in the case." n27 In Potts, this court indicated that, under Northwestern Fuel Co., "the District Court should have...fully canvassed the situation from the standpoint of determining where the equities lay to adjudge accordingly. Such a proceeding is purely equitable; it should have been decided upon equitable grounds." n28

In direct conflict with the foregoing Supreme Court precedents, the majority follows a rule of its own creation, viz., that "disputed registry funds should [be] disbursed back to the party that deposited them in the registry" when it is later determined that the depositary court lacked subject matter jurisdiction. However, the majority not only fails to cite any authority for its rule, it does not even attempt to reconcile the rule with the duty imposed on depositary courts' to decide claims to registry funds on equitable grounds by the Supreme Court decisions, Rule 67 and 28 U.S.C. §§ 2401 and 2042.

Under the principles articulated by the Supreme Court in Northwestern Fuel and other decisions, the district court has inherent power to undo any wrong done by the bankruptcy court's decree which, unknowingly without jurisdiction, consented to adjudicate the parties' claims over disputed funds to be deposited in court pending the outcome of its decision; and the district court has the power to distribute the funds in its custody according to equitable principles, including those provided by 28 U.S.C. §§ 2041 & 2042 for deposits in court, in such manner as to avoid an unlawful, unjust or inequitable result. Consequently, I believe that both the majority and the district court here are in error in

failing to recognize the district court's judicial power and duty to undo any wrong done by the bankruptcy court's process and to distribute the funds in accordance with 28 U.S.C. §§ 2041-2042 and equitable principles.

Of course, as the Supreme Court's cases make clear, this does not mean that the district court should adjudicate the civil action or review the bankruptcy court's decision on the merits. Instead, pursuant to Rule 67 and 28 U.S.C. §§ 2041-2042, the district court, and not this court, must determine rightful ownership of the funds and disburse the funds to the owner.

Under Rule 67, the disbursement of funds is governed by 28 U.S.C. §§ 2041 and 2042; these statutory provisions assign the power and duty of approving disbursements exclusively to the depositary court; and §§ 2041 & 2042 require that the depositary court disburse the funds only to persons judicially determined to be rightful owners. The purpose of a deposit under Rule 67 is to relieve the depositor of responsibility for the money or thing in dispute while the parties litigate their differences with respect to the rest. n29

Once the deposit is made, the funds can be withdrawn only by order of the depositary court. Rule 67 specifically states that 28 U.S.C. §§ 2041 and 2042 provide the rules that must be followed by the court and the parties with respect to orders of withdrawal or disbursement. "Money paid into court under [Rule 67] must be deposited and withdrawn in accordance with the provisions of Title 28, U.S.C., §§ 2041 and 2042...or any like statute." n30 Funds deposited in court are held

only for those persons judicially found by the court to be entitled to them as rightful owners. n31 The burden is on the claimant to establish his right to withdraw money deposited with the court. n32 The right to recover from a fund deposited in court must be based on the strength of the title of the claimant and not on the weakness of the title or another claimant. n33 Rule 67 providing for deposit in court, generally, continues in effect similar special provisions contained in statutes and rules pertaining to bills of interpleader, bills in the nature of interpleader, and admiralty. n34 Proceedings for disbursement of funds deposited in court are equitable in nature and in the nature of interpleader. n35

Here, the district court disregarded or was unaware of its duty under 28 U.S.C. §§ 2041 and 2042 to determine the persons who were entitled to the funds on deposit and to disburse them only to the rightful owners. The district court did not take evidence on or inquire into rightful ownership in accordance with 28 U.S.C. §§ 2041 and 2042. Instead, the district court acted as if it had no jurisdiction to inquire into equitable entitlement and summarily, without giving any clear reasons, disbursed the funds first to Craig's, but, after reversing itself, to BOL. Consequently, the district court did not perform its duty under §§ 2041 and 2042 to determine the rightful owner of the deposited funds by a preponderance of the evidence before delivering them.

Furthermore, 28 U.S.C. §§ 2041 and 2042 provide that funds deposited in court may be disbursed only by order of the depositary court to persons judicially determined to be entitled to them. n36 Appellate courts are not vested with original jurisdiction, authorized by

rule or law to make this determination, or permitted to render disbursement orders. Hence, the majority has fallen into error by instructing the district court to disburse the funds to Craig's without first making a determination under Rule 67 and §§ 2041 & 2042 of who is the rightful owner of the money.

Besides, as a purely practical matter, this court is ill-equipped to perform this function since we cannot easily inquire into or elicit evidence on the pertinent issues. That is especially so in the present case. The district court and the parties did not proceed to inquire into rightful ownership under Rule 67 and §§ 2041 and 2042; apparently they were unaware of these provisions or mistakenly thought the district court lacked judicial power to determine rightful ownership. Therefore, the present record does not contain sufficient evidence on these issues to enable us to decide them initially, even if it were permissible for us to do so. Accordingly, I would vacate the district court's judgment and remand the case to the depositary court for it to determine how the funds on deposit shall be distributed according to 28 U.S.C. §§ 2041 and 2042.

Ultimately, the majority's disposition of this case does not comply with law, equity or justice and does not return the parties to their original positions. As the majority notes, "ownership of the money in the court's registry was at all times disputed. . . ." n37 Thus, the majority's transfer of all of the funds to Craig's simply because Craig's initially deposited most of the funds into court overlooks the basic fact that neither party had a clear right to the money. Instead, both parties had claims to the money and this is reason that the funds had been deposited into court.

The majority's peremptory transfer of funds to Craig's also disregards the significant changes in position by BOL in consideration of the deposit and the parties' agreement to litigate over the money within the court's registry. Before the parties agreed to the consent decree establishing ground rules for the bankruptcy court's adjudication of their claims, Craig's had possession of most of the funds, but BOL had several viable claims or actions against Craig's, i.e., an objection to the bankruptcy court's jurisdiction, an injunction action against Craig's, a counterclaim against Craig's, and a claim to have the proceedings converted to a Chapter 7 proceeding.

The bankruptcy court, upon agreement of the parties, entered a consent decree which provided, inter alia, that (1) Craig's shall deposit and the clerk shall accept into the registry of the court $ 251,440.40 being the funds in dispute; (and BOL was later required to deposit $ 10,058 into the court) (2) the adversary proceedings were consolidated; (3) BOL's objection to the bankruptcy court's jurisdiction was withdrawn; (4) BOL's motion to convert Craig's bankruptcy proceeding to a Chapter 7 proceeding was withdrawn; (5) BOL allowed its injunction action become moot; (6) BOL was allowed to file its counterclaim; and, (7) the parties stipulated that the deposited funds would remain in the court's registry pending their litigation over the deposit and the bankruptcy court's adjudication of their claims. Thus, both parties significantly changed their positions and gave and received benefits from their agreement to litigate over the disputed funds deposited in the bankruptcy court.

The bankruptcy court adjudicated the claims pursuant

to the parties' agreement, which it had approved. But the bankruptcy court's decision and judgment were voided by the decision of this court that the bankruptcy court did not have jurisdiction to decide the civil action on the merits. The purpose of the parties' agreement, to submit their claims against the disputed funds adjudicated by the bankruptcy court, was frustrated and its full performance made impossible by the jurisprudential development that deprived the bankruptcy court of jurisdiction.

Consequently, a disbursement of the funds to Craig's free and clear of BOL's claims, without compensating BOL for the loss of its claims against the funds and against Craig's personally will unjustly enrich Craig's and be detrimental to BOL. BOL will suffer the unjust penalty and hardship of being deprived of its claims to ownership of the funds without a hearing. The result will be highly inequitable and will not return the parties to their former positions.

For all of these reasons, this case should be remanded to the district court with instructions that it perform its statutory duty under Rule 27 and 28 U.S.C. §§ 2401 and 2042, to determine rightful ownership of the funds in the court's registry and distribute those funds accordingly.

Footnotes

n1 In fact, the Bank actually re-asserted its breach of contract claim immediately after the Agreed Order was entered by the bankruptcy court. The bankruptcy court ultimately granted relief to both parties on their respective contract claims, concluding that Craig's was

entitled to a net recovery against the Bank. This judgment was, of course, subsequently vacated and the adversary proceeding dismissed because the bankruptcy court lacked jurisdiction. See Bank of La. v. Craig's Stores of Texas, Inc. (In re Craig's Stores of Tex., Inc.), 266 F.3d 388 (5th Cir. 2001).

n2 If Craig's had, indeed, agreed to settle with the Bank, the Agreed Order does not memorialize such a settlement.

n3 The power described in Northwestern Fuel Co. v. Brock, 139 U.S. 216, 11 S. Ct. 523, 35 L. Ed. 151 (1891), and United States v. Morgan, 307 U.S. 183, 59 S. Ct. 795, 83 L. Ed. 1211 (1939), "to correct that which has been wrongfully done by virtue of its process," Morgan, 307 U.S. at 197, 59 S. Ct. at 802, is different from the dissent's concept of an equitable power to determine ownership of funds voluntarily placed in the registry of a court lacking jurisdiction. Northwestern Fuel describes the power "to correct by its own order that which, according to the judgment of its appellate court, it had no authority to do in the first instance," 139 U.S. 216 at 219, 11 S. Ct. 523 at 524, 35 L. Ed. 151; it does not describe an equitable power to determine the merits of property ownership.

In the case before us, there is no order that has been executed under the compulsion of an incorrect or unauthorized court judgment, and thus the inherent equitable power to order restitution for the error does not come into play. See Restatement (First) of Restitution § 74 (1973). No compulsory order stands in need of rectification, remediation or restitution; instead, there is only a sum of money voluntarily deposited by

Craig's in the registry of a court lacking jurisdiction. Lacking jurisdiction to receive money into its registry, the district court's authority is limited to returning the money to the depositor -- this is the only means by which Craig's original deposit can be "undone," to use the terminology of Northwestern Fuel and Morgan. Because the $ 252,440.49 belonged only to Craig's Stores when and as it was voluntarily deposited, and the court had no jurisdiction to decide the relative merits of the underlying dispute, it still belongs to Craig's Stores.

We also disagree with the dissent's reading of 28 U.S.C. § 2042. This code section governs the disbursement of registry funds that have languished "for at least five years unclaimed," and have thereby been forfeited to "the Treasury in the name and to the credit of the United States." Id. It is only "such" forgotten funds that the district court, "upon notice to the United States attorney" as representative of the United States, its new nominal owner, is duty-bound under this code section to determine entitlement, upon "full proof of the right thereto." Id. A straightforward reading of this code section indicates that it has a specific and narrow application that is not relevant to this case. Additionally, neither the language of Rule 67 or 28 U.S.C. § 2041 create the statutory duty to disburse funds only to persons judicially determined to be the rightful owners.

n4 This case is similar to "numerous other cases involving 'jurisdiction to determine jurisdiction' and presenting situations in which the determination of the jurisdictional question involves essentially the same analysis as the determination of the case on the merits."

ECEE, Inc. v. FERC, 611 F.2d 554, 555 n.4. (5th Cir. 1980) (citing United States v. United Mine Workers, 330 U.S. 258, 91 L. Ed. 884, 67 S. Ct. 677 (1957); Nestor v. Hershey, 138 U.S. App. D.C. 73, 425 F.2d 504 (D.C. Cir. 1969); Means v. Wilson, 383 F. Supp. 378 (D. S.D. 1974), modified on other grounds, 522 F.2d 833, cert. denied, 424 U.S. 958, 47 L. Ed. 2d 364, 96 S. Ct. 1436)).

n5 See, e.g., Northwestern Fuel Co. v. Brock, 139 U.S. 216, 219, 35 L. Ed. 151, 11 S. Ct. 523 (1891) (citing Mayor v. Cooper, 73 U.S. 247, 6 Wall 247, 250, 18 L. Ed. 851; Hornthall v. Collector, 76 U.S. 560, 9 Wall. 560, 566, 19 L. Ed. 560; Mansfield, Coldwater & Lake Mich. Ry. Co. v. Swan, 111 U.S. 379, 387, 28 L. Ed. 462, 4 S. Ct. 510 (1884)); W. F. Potts Son & Co. v. Cochrane, 59 F.3d 375 (5th Cir. 1932).

n6 See Northwestern Fuel Co., 139 U.S. at 219 and 220 (citing Bank of the United States v. Bank of Washington, 31 U.S. 8, 6 Pet. 8, 17, 8 L. Ed. 299 and 2 Salk. 587, 588; Tidd, Pr. 936, 1137, 1138).

n7 139 U.S. 216, 35 L. Ed. 151, 11 S. Ct. 523

n8 Id. at 219-220.

n9 Id.

n10 Id. at 219.

n11 Id. at 219-20 (emphasis added).

n12 See RESTATEMENT (FIRST) OF RESTITUTION § 74.

n13 Id. at cmt. b.

n14 Id. at notes cmt. a.

n15 Id.

n16 307 U.S. 183, 83 L. Ed. 1211, 59 S. Ct. 795 (1939).

n17 Id. at 197-98.

n18 See id. (stating "it is a power 'inherent in every court of justice so long as it retains control of the subject-matter and of the parties, to correct that which has been wrongfully done by virtue of its process.'" and citing Arkadelphia Milling Co. v. St. Louis S.W. Ry. Co., 249 U.S. 134, 63 L. Ed. 517, 39 S. Ct. 237 (1919); Northwest Fuel Co.,139 U.S. at 219); id. (stating "what has been given or paid under the compulsion of a judgment the court will restore when its judgment has been set aside and justice requires restitution." and citing Northwestern Fuel Co., 139 U.S. at 219; Ex parte Lincoln Gas & Electric Light Co., 257 U.S. 6, 7, 66 L. Ed. 101, 42 S. Ct. 2 (1921); Baltimore & Ohio Ry. Co. v. United States, 279 U.S. 781, 786, 73 L. Ed. 954, 49 S. Ct. 492 (1929)).

n19 Id. at 198.

n20 Id. at 191.

n21 139 U.S. at 220.(emphasis added).

n22 307 U.S. at 193-94.

n23 Id. at 194.

n24 59 F.2d 375.

n25 Id. at 377 (citing, inter alia, Northwestern Fuel Co., 139 U.S. 216, 35 L. Ed. 151, 11 S. Ct. 523; Arkadelphia Milling Co., 249 U.S. 134, 63 L. Ed. 517, 39 S. Ct. 237; Baltimore & Ohio R. Co., 279 U.S. 781, 73 L. Ed. 954, 49 S. Ct. 492).

n26 W.F. Potts, 59 F.2d at 377 ("The appointment of a receiver is at last the court's appointment; the administration, its administration.").

n27 Id.

n28 Id. at 378.

n29 Cajun Elec. Power Coop. Inc. v. Riley Stoker Corp., 901 F.2d 441, 444 (5th Cir. 1990). Once the deposit is made, the depositor is no longer liable for interest on the fund. See 13 MOORE'S FED. PRAC. 3D § 67.03 (citing authorities).

n30 FED. R. CIV. P. 67.

n31 See 12 WRIGHT & MILLER, FED. PRAC. & PROC. § 2992. Title 28, U.S.C. § 2041 provides, in relevant part, that "all moneys paid into any court of the United States. . .in any case pending or adjudicated in such court, shall be deposited with the Treasurer of the United States or a designated depositary. . . .this section shall not prevent delivery to the rightful owners upon security, according to agreement of parties, under the direction of the court." Section 2042 also provides, in relevant part, that "no money deposited under section 2041 of this title shall be withdrawn except by

order of court. In every case in which the right to withdraw has been adjudicated or is not in dispute and such money has remained so deposited for at least five years unclaimed by the person entitled thereto, such court shall cause the money to be deposited in the Treasury. . . .any claimant entitled to any such money may, on petition to the court...and full proof of the right thereto, obtain an order directing payment to him."

n32 Hansen v. United States, 340 F.2d 142, 144 (8th Cir. 1965); United States v. Beach, 113 F.3d 188, 191 (11th Cir. 1997) (citing United States v. Kim, 870 F.2d 81, 84-85 (2d Cir. 1989) (applying preponderance of the evidence standard).

n33 United States ex. rel. Home Indem. Co. v. Am. Employers' Ins. Co., 192 F. Supp. 873, 876 (D. N.D. 1961) (citing United States v. Chapman, 281 F.2d 862, 867 (10th Cir. 1960)).

n34 See 13 MOORE'S FED. PRAC. & PROC. § 67 App. 01 (citing former statutes, admiralty rules, and committee note.)

n35 See, e.g., United States v. Beach, 113 F.3d at 191 (quoting United States v. $ 17,400 In Currency, 524 F.2d 1105, 1108 (10th Cir. 1975) (Doyle, J., dissenting) (describing petition for withdrawal of funds pursuant to 28 U.S.C. § 2042 as "being in the nature of an interpleader action")).

n36 See 28 U.S.C. § 2041-42

n37 Maj. Op. at 5.

CIVIL ACTION H-97-3753
BANKRUPTCY 93-48674
ADVERSARY 96-4541

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

In Re:
CRAIG'S STORES OF TEXAS INC.,
Debtor.

CRAIG'S STORES OF TEXAS INC.,

versus

BANK OF LOUISIANA,

September 12, 2003, Filed

ORDER DISBURSING FUNDS

In the circumstances of this case, an in rem deposit of $262,490.88 was placed in the court's registry to secure Bank of Louisiana's account with Craig's Store of Texas, Inc., while the parties litigated their claims. This court held that it did not have jurisdiction over the claims, ending the litigation in this court. No other litigation pends. The sensible result is to disburse the funds to Bank of Louisiana, regardless of the source of the funds or who deposited them in the registry. The funds were not paid years ago to the bank on its claim because of the assertion of bankruptcy and other defenses by Craig's, which were dismissed by final judgment on appeal in 2001.

The clerk of the court will disburse the deposit with $75,933.59 in interest to Bank of Louisiana by September 12, 2003.

This order disposes of all remaining claims, issues, and questions in this case. This case is closed.

Signed September 11, 2003, at Houston, Texas

/s/
Lynn N. Hughes
United States District Judge

No. 03-20888

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

In The Matter of:
CRAIG'S STORES OF TEXAS INC.,
Debtor.

CRAIG'S STORES OF TEXAS INC.,
Appellant,

versus

BANK OF LOUISIANA,
Appellee.

May 2, 2005, Filed

Appeal from the Untied States District Court for the Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC

(Opinon 3/4/05, 5 Cir., ____, ____ F.3d ____)

Before REAVLEY, JONES and DENNIS, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having

requested that the court be polled on Rehearing En Banc (Fed. R. App. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

Case No. 93-48674-H3-11
(CHAPTER 11)

ADVERSARY NO. 96-4541

IN RE:

CRAIG'S STORES OF TEXAS, INC.
Debtor.

BANK OF LOUISIANA,
Plaintiff

v.

CRAIG'S STORES OF TEXAS, INC.
AND THE OFFICIAL COMMITTEE
OF UNSECURED CREDITORS,
Defendants.

AGREED ORDER REGARDING REQUEST FOR PRLIMINARY INJUNCTION

CAME ON for consideration the Amended Complaint for Preliminary Injunction filed by Bank of Louisiana ("BOL"). After considering the request for a preliminary injunction and the parties' announcement that they have reached an agreement and consent to the entry of this order (as evidenced below by the signatures of their respective counsel), the Court finds sufficient cause exists for granting this Agreed Order. It is therefore,

ORDERED that on or before October 11, 1996 that the Debtor shall deposit and the Clerk shall accept for

deposit into the registry of this Court (the "Court's Registry") $252,440.49, which BOL represents is the sum of the balances that are 90 days or more past due on the credit card accounts as of August 30, 1996 and not previously charged back to the Debtor by BOL (called the "ACCOUNTS"), as provided for in the Bank of Louisiana in New Orleans Charge Plain Merchant-Member's Sales/Assignment of Accounts Receivable Agreement dated November 22, 1989 and the Modification and Ratification dated as of December 31, 1994 (called together the "CHARGE PLAN"). It is further

ORDERED that beginning on October 5, 1996 and continuing thereafter on the 5th day of each subsequent month, BOL will represent to the Debtor the amount in accounts charged back to the Debtor since August 30, 1996 (the "CHARGE BACK AMOUNT"), and the amount owed by accounts which are 90 days or more past due (the "NINETY DAY AMOUNT"). BOL will provide to the Debtor the listing called the CARDPAC PAST DUE BY AGE-52-, dated as of the last day of the prior month, in support of the representation of the NINETY DAY AMOUNT. BOL will provide to the Debtor the ACCOUNTS CHARGED BACK TODAY report each time BOL charges back accounts to the Debtor in support of the CHARGE BACK AMOUNT. If the sum on deposit, at that time, in the Court's Registry is less than the sum of the NINETY DAY AMOUNT and the CHARGE BACK AMOUNT, then the Debtor will deposit the difference in the Court's Registry on or before the 10th day of the applicable month. The Debtor shall continue to make payments into the Court's Registry on a monthly basis as necessary and set forth above, until further written

agreement of all parties or further order of the Court after notice to all parties and opportunity for hearing. It is further

ORDERED that all interest earned on the proceeds deposited in the Court Registry will be paid to the recipient of the funds upon further order of the Court. It is further

ORDERED that upon deposit of the proceeds into the Court Registry, BOL shall cease the charging of interest on those proceeds to the Debtor, except for such interest as may be earned in the Court's Registry. It is further

ORDERED that the Debtor shall continue to make payments to the creditors of Debtor's estate as required and provided for under Debtor's Amended Plan of Reorganization Under Chapter 11 of the United States Bankruptcy Code, confirmed by order of this Court entered December 14, 1994 (the "Plan"). The Debtor hereby represents to this Court, the Official Committee of Unsecured Creditors (the "Committee") and BOL that according to the balance sheet prepared by the Debtor's consulting accountant as of July 31, 1996 and reconciled to statements of accounts as were available as of June 30, the Debtor had approximately $1.1 million in cash and liabilities of approximately $453,000.00 Since July 31, 1996, the Debtor has paid out approximately $146,000.00 in payment of taxes in the approximate amount of $132,215.00 and salaries in the approximate amount of $6,800.00 The Balance Sheet does not reflect an accurate assessment of assets and liabilities related to the CHARGE PLAN. It is further

ORDERED that the Debtor shall not pay any dividends or make any other distributions to any of its shareholders pending further written agreement of all parties or further order of this Court after notice to all parties and opportunity for hearing. It is further

ORDERED that BOL shall immediately commence providing to the Debtor the normal information which it had herefore been providing to the Debtor prior to the filing of this Adversary Proceeding, which information shall include the following:

1. list of past due Accounts by age (Card PAC 52) for the Debtor and Everett Buelow;
2. death certificate or other relevant information received by BOL on any deceased debtors;
3. notice to creditors on any bankruptcies;
4. description and support for any deduction from the reserve account;
5. monthly account statement. It is further

ORDERED that BOL shall provide to the Debtor the information described in the foregoing paragraph for the months of June, July and August 1996 (if BOL has not already done so). It is further

ORDERED that all future notices and correspondence shall be sent to the Debtor c/o Craig's Stores of Texas, P.O. Box 31900-324, Houston, Texas 77231-1900 and to BOL c/o Bank of Louisiana, P.O. Box 6972, Metairie, Louisiana 70009-6972, Attn: Jerry Smith, and to their respective counsel as listed below. It is further

ORDERED that within five (5) working days of the date of the entry of this order, BOL shall present to the Court (under a green sheet) (i) an order consolidating this Adversary Proceeding with Adversary Proceeding No. 96-4345 and withdrawing the Committee as a party to this Adversary Proceeding, (ii) an order withdrawing, without prejudice, its Motion to Cure Defaults and to Provide Adequate Assurance of Future Performance with Respect to Confirmed Plan, or in the Alternative, to Convert Case to Chapter 7, and (iii) an order withdrawing its motion to dismiss Adversary Proceeding No. 94-4354 of improper venue. It is further

ORDER that leave is hereby granted to BOL to the file (i) an amended answer and (ii) a counterclaim against the Debtor in the Adversary Proceeding No. 96-4354. It is further

ORDER that BOL shall cooperate with the Debtor in the sale of the accounts owned by BOL under the CHARGE PLAN by providing as quickly as possible the answers to reasonable requests made by potential buyers. It is further

ORDERED that Debtor and the Committee shall not have to file an Answer to BOL Complaint in Adversary Proceeding No. 964541.

ORDERED that unless otherwise agreed in writing by BOL and the Debtor or unless otherwise ordered by the Court after notice to all parties and opportunity for hearing, BOL and the Debtor shall abide by the Scheduling Order previously entered in Adversary Proceeding No. 96-5454. The Scheduling Order

previously entered by this Court in Adversary Proceeding No. 96-4541 is hereby withdrawn and vacated.

SIGNED this 2 day of October, 1996.

/s/
UNITED STATES BANKRUPTCY JUDGE

BANK OF LOUISIANA

By: /s/
Henry L. Klein
844 Barone Street
New Orleans, Louisiana 70113-1103
Telephone: (504) 586-9971
Telecopy: (504) 586-9715
ATTORNEY FOR BANK OF LOUISIANA

By: /s/
James W. Doyle
State Bar No. 06094600
William A. (Trey) Wood III
State Bar No. 21916050
WINSTEAD SECHREST & MINICK, P.C.
910 Travis Building, Suite 1700
Houston, Texas 77002
Telephone: (713) 650-8400
Telecopy: (713) 951-3800
LEGAL COUNSEL FOR BANK OF LOUISIANA

CRAIG'S STORES OF TEXAS, INC.

By: /s/
John Glover
State Bar No. 08038500
Roland Reese
State Bar No. 16710700
CHAMBERLAIN, HRDLICKA, WHITE,
WILLIAMS & MARTIN
1200 Smith, Suite 1400
Houston, Texas77002-4310
Telephone: (713) 658-1818
Telecopy: (713) 658-2553
ATTORNEY FOR CRAIG'S STORES OF TEXAS,
INC.

By: /s/
James J. Hansen
State Bar No. 08929730
PAGE, MURPHY, BYLERLY & HANSEN, P.L.L.C.
1360 Post Oak Boulevard, Suite 2450
Houston, Texas 77056
Telephone: (713) 877-8200
Telecopy: (713) 877-8202
ATTORNEY FOR CRAIG'S STORES OF TEXAS,
INC.

THE OFFICIAL COMMITTEE
OF UNSECURED CREDITORS' COMMITTEE

By: /s/
Jay R. Indyke
SIEGEL, SOMMERS & SCHWARTZ
470 Park Avenue South
New York, New York 10006

Telephone: (212) 889-7570
Telecopy: (212) 889-0688
ATTORNEY FOR THE OFFICIAL COMMITTEE
OF UNSECURED CREDITORS' COMMITTEE